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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 896

ANDREW J. KALERAK, JR., ET AL., *Petitioners*,

v.

STEWART L. UDALL, Secretary of the Interior, AND STATE OF ALASKA, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Andrew J. Kalerak, Jr., et al., plaintiffs in this action, pray that a writ of certiorari be granted to review the judgment of the Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is at 396 F.2d 746. It is reprinted at Appendix A, pp. 1a to 6a, *infra.* The opinion of the United States District Court for the District of Alaska is not reported. It is reprinted at Appendix B, pp. 7a to 19a,

infra. The decision of the Secretary of the Interior is reported at 73 I.D. 1. It is reprinted at Appendix C, pp. 20a to 39a, *infra.* The decision of the Bureau of Land Management is not reported. It is reprinted at Appendix D, pp. 40a-43a, *infra.*

JURISDICTION

The decision of the Court of Appeals was issued on June 19, 1968. A timely petition for rehearing was denied on September 23, 1968. On December 14, 1968 Mr. Justice Douglas extended the time to file this Petition until January 3, 1969. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The Alaska Statehood Act grants that State the right to select up to 102,550,000 acres of public lands which are "vacant, unappropriated and unreserved at the time of their selection"; it also gives the State the exclusive right of selection during a 90-day period "upon the revocation of any order of withdrawal." Alaska filed an application selecting certain lands while they were withdrawn, and after revocation of the withdrawal order, filed amendments thereto seeking additional lands. An Interior Department regulation, with the force of law, provides that amendments to invalid selections will not be allowed.

The question presented is whether, notwithstanding the governing statute and regulations, the court below lawfully sustained the Secretary's award of the originally selected lands to Alaska on the ground that the State "intended" its "amendments as a reassertion of the original land descriptions"?

STATUTES, REGULATIONS AND PUBLIC LAND ORDERS INVOLVED

This case involves §§ 6(a), 6(b) and 6(g) of the Alaska Statehood Act, 72 Stat. 339, 48 U.S.C. ch. 2 §§ 6(a), (b) and (g). It also involves Interior Department regulations 43 C.F.R. §§ 1821.6-6, 2222.9-3, 2222.9-4, 2222.9-5 and the Department's Public Land Orders 576, 14 F.R. 1614 and 3022, 28 F.R. 3661. These are reprinted in pertinent part in Appendix E, *infra*.

STATEMENT OF THE CASE

INTRODUCTION

Petitioners are private individuals who made separate applications for homestead and trade and manufacturing sites on public lands. The State of Alaska claims the same lands as part of a prior selection which it had made pursuant to the Alaska Statehood Act, 72 Stat. 339, 48 U.S.C. ch. 2, which authorizes it to select up to 102,550,000 acres "from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection." The Secretary of Interior sustained Alaska's claim, reversing a decision of the Office of Appeals of the Bureau of Land Management which had declared Alaska's selection to be invalid because the lands were *not* "vacant, unappropriated, and unreserved at the time of their selection," but were, rather, in a state of withdrawal. The controversy is entirely one of law, specifically, of the Secretary's duty to comply with the clear language of the Alaska Statehood Act and with his own regulations promulgated pursuant thereto and to the public land laws generally.

A. The Basis of the Parties' Conflicting Claims

The disputed land is located in Townships 11 and 12 North, Ranges 1 and 2 West, Seward Meridian, Alaska. At the time Alaska became a State, the land was not open to entry, having been withdrawn by the Secretary "from all forms of appropriation under the public land laws." Public Land Order 576, 14 F.R. 1614 (March 29, 1949) (p. 49a *infra*). The Secretary's decision describes the beginnings of what it candidly refers to as the "attempt to transfer the selected lands from the Federal Government to the State" (p. 21a, *infra*):

"[On March 8, 1962] the City of Anchorage [requested] the Anchorage land office that these lands be withdrawn for watershed purposes for the protection of the city's water supply. In a letter dated September 28, 1962, to the State Division of Lands, the State office of the Bureau of Land Management said that the city was not a proper applicant for a withdrawal and that most of the land it desired was already withdrawn or otherwise segregated. It then offered as a suggestion for placing the lands in State or local ownership that the State file a blanket selection for the withdrawn lands with an assurance that the selected lands would be classified for water shed purposes. The Bureau would then, the letter continued, request revocation of paragraph (4) of P.L.O. 576 and, when that was done, the State selection would become effective immediately."

On January 8, 1963, invoking the Alaska Statehood Act, Alaska filed formal application A-058566 for 26,880 acres of public land, including the lands withdrawn by P.L.O. 576, among them all lands involved in this case. It is reprinted in Appendix F, pp. 51a-52a *infra*.

On April 8, 1963, the Secretary revoked P.L.O. 576 insofar as it affected the lands involved in this litigation. P.L.O. 3022, 28 F.R. 3661. The Order declared that the State of Alaska would have a preferred right to select the lands for three months, and that beginning July 8, 1963, the lands would be subject to the operation of the public land laws generally (p. 50a *infra*).

As the Court below recognized, "during the ninety-day period Alaska did not file a new application for the selecting of the 26,880 acres of land (including those here in question) which were described in its application of January 8, 1963." However, by four separate letters the State amended its original application, adding to the lands described in the January 8 application, but not mentioning any of the land involved herein.[1] These applications were filed in the

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[1] The letters were identical in form, differing only in date and description of the lands selected. They were addressed to the Anchorage Land Office of the Bureau of Land Management and Signed by John E. Friberg, Acting Selection Officer of the State's Department of Natural Resources. The text of the first of these letters was as follows:

Gentlemen:

Reference is made to State selection application, Bureau of Land Management, Anchorage 058566.

It has been brought to our attention that there are lands which the State should have selected within the general boundaries of the selection application. The State of Alaska hereby requests that its selection application be amended to include the following described lands:

T. 11N., R. 2W., Seward Meridian (Unsurveyed)

Section 14: S-½	320.00 Acres
(See Exhibit A Attached)	630.00
Containing Approx	950.00 Acres

Thank you for your co-operation.

Lands office on April 8, 1963; May 24, 1963; March 13, 1964, and March 17, 1964. (See p. 22a, n. 4, *infra*). The first two dates fell within the 90-day period.

On October 8, 1964, the Anchorage Land Office directed the State to publish a notice of its application in an Anchorage newspaper for five consecutive weeks, which the State did. See p. 20, n. 17, *infra*.

On May 27. 1965, petitioner Kalerak filed a Notice of Location of Settlement or Occupancy Claim in Alaska, stating that he had made a settlement under the homestead laws on May 26, 1965, on unsurveyed lands which would probably be the NW-¼ sec. 19, T. 12N., R. 2W., S.M., Alaska. On separate days between May 28 and June 17, 1965. the other petitioners filed their claims, also within the area covered by Alaska's January 8, 1963 selection. See p. 20a, n. 1, *infra*. On June 9, 1965, the Anchorage Land office issued a decision refusing to accept Kalerak's application for recordation on the ground that it conflicted with the State's selection. The land office made the same rulings with respect to the applications of the other petitioners.

On July 29, 1965 the state filed a blanket selection on all lands which had been selected on January 8, 1963 or in the subsequent amendments.

B. The Appellate Proceedings Within the Interior Department

1. Bureau of Land Management

Kalerak and the other applicants thereupon filed appeals with the Bureau of Land Management of the Department of the Interior. Ruling on Kalerak's appeal, the Chief of the Office of Appeals determined that Alaska's application was not valid and that Kale-

rak's homestead claim should have been accepted and recorded by the land office. He wrote:

> "The Act of July 7, 1958, *supra,* grants to the State of Alaska the right to select, within 25 years from January 3, 1959, not to exceed 102,550,000 acres *from the public lands of the United States which are vacant, unappropriated and unreserved at the time of their selection.*
>
> "It cannot be said that the subject land was vacant, unappropriated and unreserved, at the time the State of Alaska filed its selection application on January 8, 1963. The record shows that the land in question was included in some 17,800 acres of lands which were withdrawn by paragraph 4 of Public Land Order 576 of March 29, 1949, * * *. The lands were so withdrawn at the time it filed its selection application in the land office on January 8, 1963 * * *. The Department has consistently held that an application filed for land while the land is withdrawn is invalid. The fact that the land was later restored from the withdrawal does not validate the application. [Citing cases]. * * *
>
> "It can only be concluded then that the land embraced in the homestead claim of the appellant, Andrew Kalerak, Jr., was in fact open to settlement or occupancy as a homestead entry as claimed in his notice of location filed in the land office on May 27, 1965. Therefore, the appellant's notice of location is proper for acceptance and recordation as of the date of its filing in the land office." (Pp. 41a, 43a, *infra,* emphasis in original.)

2. The Secretary of the Interior

Alaska appealed to the Secretary of the Interior. On January 20, 1966, in a decision by the Deputy Solicitor, the Secretary reversed the Bureau of Land Management, and approved the Anchorage land office's

refusal to record the petitioners' several notices of occupancy or settlement.[2]

As the Court of Appeals later summarized his decision (pp. 3a-4a, *infra*), the Secretary ruled, alternatively:

> (1) Whether or not Alaska's original selection was defective because made with reference to lands which were then withdrawn, it nevertheless accomplished a segregation of those lands such that they were not subject to applications and appropriations under the public land laws, the result being that plaintiffs' claims for settlement or location, made while such segregation was in effect, were invalid; and
>
> (2) Alaska's four amendments of its original application for selection, made after the withdrawal of the lands had been revoked, amounted to a reapplication for selection of the lands described in the original application, the result being that plaintiffs' claims, subsequently tendered for filing, were properly rejected.

C. Judicial Proceedings

1. The District Court

Petitioners then brought this action in the United States District Court for Alaska against the Secretary of Interior, praying that his decision be reversed and the proceeding remanded to the Anchorage District Land Office for proper recordation of petitioners' claims. The State of Alaska was permitted to intervene on behalf of the Secretary. On cross-motions for

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[2] With respect to petitioners other than Kalerak, the Secretary exercised his authority to assume jurisdiction over cases pending on appeal in the Bureau of Land Management.

summary judgment, the District Court set aside the Secretary's Decision.

The Court held first that Alaska's selection of January 8 was not a valid selection. The Court declared:

> "Lands which have been withdrawn for a lawful purpose are not public lands and are to be regarded as excepted from subsequent laws, grants and disposals which do not specially disclose a purpose to include them. (P. 10a, *infra*).

The Court then observed that § 6(g) of the Alaska Statehood Act "stated in clear and unambiguous language that where the land has been withdrawn that *upon* the revocation of the order of withdrawal the State shall have not less than 90 days, *during which period* the State shall have a preferred right of selection. Where, as here, Congress has expressed itself in clear and unambiguous language it must be held to have meant what it plainly expressed." (Pp. 12a-13a, *infra*, emphasis in original.) The Court concluded (p. 17a, *infra*):

> "Regardless of any reliance that the State may have placed on the Bureau of Land Management's interpretation of the statute and applicable regulations prior to April 8, 1963, no reason existed from that day forward to justify reliance on the practices, understanding, notices, agreements or interpretation which existed between the City, the State and the Bureau of Land Management. Section 6(g) of the Act, section 76.15 [now 2222.9-4] of the regulations and the provisions of PLO 3022 specifically and clearly spelled out what steps the State was required to take to obtain a preferred right of selection and the precise period of time within which such right had to be exercised. In view of this, the State cannot seriously

> contend that it was not necessary for it to comply with the law and to exercise its preferred right of selection during the 90 day period afforded it between April 8, 1963, and 10:00 a.m. on July 8, 1963."[3]

2. The Court of Appeals

The Court of Appeals reversed the District Court and reinstated the Secretary's order. The Court did not pass on the segregation issue. Rather, it held that the District Court erred in failing to afford validity to Alaska's selection on the basis of Alaska's four amendments to its original application. The following is the critical language o the Court's opinion (p. 4a, *infra*):

> "In our opinion the district court erred in failing to accept the second of these rulings. While Alaska's four amendments of the original application did not include the land descriptions set out in the original application, the state intended such amendments as a reassertion of the original land descriptions as well as applications for the selection of additional lands. This is indicated by the facts that: (1) the new lands were brought in by amendment of the original application (referring thereto by number), rather than by new applications, (2) the amendments referred to 'additional open lands,' indicating Alaska's view that it wished to select the lands described in the original application, and add thereto, and (3) the notice

[3] The Court also held that the Secretary's segregation theory was invalid. On this issue the Court reasoned that the regulation on which the Secretary relied does not "apply to lands that are withdrawn for all forms of appropriation under the public land laws such as those involved in the present case." The Court declared that if the regulation were to extend to withdrawn lands, it "would result in a preference right far beyond that contemplated or authorized by Congress in section 6(g) of the Act and would therefore be void." (P. 13a, *infra*).

published after the four amendments had been filed, and before any of the plaintiffs tendered their claims for filing, named all lands described in the original application as well as the four amendments.

In view of Alaska's intent in this regard, and the lack of prejudice to plaintiffs inasmuch as they had notice of Alaska's claim to all such lands before they tendered their claims, the Secretary did not abuse his discretion in accepting the amendments as a timely reassertion of Alaska's original application."

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With the Unambiguous Directions of the Alaska Statehood Act and With Principles Firmly Established by This Court.

When Alaska was admitted into the Union it became the beneficiary of the largest land grant in the Nation's history.[4] Section 6(b) of the Alaska Statehood Act entitles the State to select within 25 years and for general purposes, 102,550,000 acres of public lands of the United States in Alaska. The same provision also describes the conditions of the grant: the lands must be "vacant, unappropriated and unreserved at the time of their selection." Alaska was thereby denied the opportunity to make immediate selection of large areas which, as Congress knew,[5] had previously been withdrawn from appropriation by the United States. With respect to such lands, Congress utilized a fa-

[4] S. Rept. 1163, 85th Cong. 1st Sess. (Providing for the Admission of the State of Alaska into the Union) p. 2.

[5] See Hearings Before the Committee on Interior and Insular Affairs, U.S. House of Representatives, 84th Cong. 1st Sess. on H. R. 2535 *et al.*, p. 245, listing public land withdrawals in Alaska of 92,700,000 acres as of June 30, 1954.

miliar technique in public land distribution—it conferred upon the State the exclusive right for a predetermined period to select lands when they were restored to the public domain, that is, reopened to entry under the public land laws.[6] In § 6(g) of the Statehood Act it granted Alaska a preferred right of selection during a period of not less than 90 days upon revocation of any order of withdrawal.

Historic practice underlies these restrictions in §§ 6(b) and 6(g). In the words of Mr. Justice Van Devanter, who, as this Court has recognized,[7] wrote with special authority concerning the public land laws:

> "While the grant as extended to Minnesota was a grant in praesenti, it was restricted to lands which were then public. The restriction was not expressed, but implied according to a familiar rule. That rule is that lands which have been appropriated or reserved for a lawful purpose are not public and are to be regarded as impliedly excepted from subsequent laws, grants, and disposals which do not specially disclose a purpose to include them. *Wilcox* v. *Jackson,* 13 Pet. 498, 513; *Leavenworth, Lawrence & Galveston R. R. Co.* v. *United States,* 92 U.S. 733, 741, 745; *Missouri, Kansas & Texas Ry. Co.* v. *Roberts,* 152 U. S. 114, 119; *Scott* v. *Carew,* 196 U. S. 100." *United States* v. *Minnesota,* 270 U. S. 181, 206.[8]

Equally well-settled was the corollary doctrine that any attempt to create an interest or right in public

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[6] We have set forth in Appendix G, p. 53a *infra,* a table of other public land laws which grant to states or particular classes of individuals the preferential right to enter upon public lands for periods ranging from 60 days to 6 months after they are opened.

[7] *Best* v. *Humboldt Mining Co.,* 371 U.S. 334, 336-337.

[8] This was already the rule in 1827. *Choiard* v. *Pope,* 12 Wheat. (25 U.S.) 587.

lands which is made before they are opened to disposition is null and void.[9]

It appears from the face of the Statehood Act that Congress made a deliberate choice in authorizing Alaska to select only from opened lands under the general purpose grant of § 6(b). By contrast, § 6(a) allows the State to select for community development up to 400,000 acres of national forest lands "which are vacant and unappropriated at the time of their selection"—omitting the additional requirement, found in § 6(b), that the lands be "unreserved" when selected. The legislative history shows that Congress understood the difference and that it deemed the most stringent limitation in § 6(b) to be necessary to prevent "any substantial interference with federal land programs." [10]

The unambiguous and purposeful conditions which Congress imposed in the Statehood Act are set at

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[9] The rule was forcefully stated by one of the Secretary's predecessors in *Smith* v. *Malone*, 18 I.D. 482, 485:

> "But there is nothing in all this which even by implication authorizes the entry of, or the initiation of entry proceedings so as to acquire any right thereunder, for lands not at that time subject to entry.
>
> "That this cannot be done may be asserted as a fundamental princip[le] in the administration of the land laws as old as the system itself * * * Authorities need not be cited for this statement, because the Department and the courts have invariably asserted the rule. And in all decisions bearing upon the subject, it is distinctly held that a right to acquire title to lands can only be initiated *after* they become subject to entry or sale."

[10] "With the exception of 400,000 acres of national-forest land, the State will not have the right to select lands which have been withdrawn from the public domain. Therefore, the grants to the new State will not cause any substantial interference with federal land programs instituted over the past many years." Sen. Rept. 1163, 85th Cong. 1st Sess. p. 2. See also House Hearings, op. cit. n. 5 *supra* pp. 244-246.

naught by the Secretary's award of the disputed lands to Alaska and its affirmance by the Court of Appeals. These lands were not "vacant, unappropriated and unreserved at the time of their selection", as § 6(b) prescribes, for they were still withdrawn by P.L.O. 576 on January 8, 1963 when Alaska, invoking § 6(b), selected them. And whereas the Secretary followed § 6(g) in P.L.O. 3022 by affording Alaska a preferred right of selection commencing April 8, 1963 ("Upon the revocation of [the] order of withdrawal"),[11] he flouted that provision in his decision, by honoring the selection Alaska made *before* that date. The District Court properly concluded, "The application filed by the State on January 8, 1963 was not a selection of the lands in accordance with * * * Section 6(g) of the Alaska Statehood Act", but was, rather, "a nullity" (p. 17a, *infra.*) But the Court of Appeals reinstated the Secretary's award, sanctioning Alaska's noncompliance with the procedures Congress had established, and rendering *them* "a nullity".

The Court of Appeals did not declare that the January 8 selection was valid; indeed, there is implicit in its opinion the acknowledgment that this selection was invalid. Rather, the Court ruled:

> "While Alaska's four amendments of the original application did not include the land descriptions set out in the original application, the state intended such amendments as a reassertion of the

[11] As the District Court put it (p. 15a, *infra*), the "significance of P.L.O. 3022 is the fact that therein the Secretary, in clear and precise language, set forth his understanding of the requirements of section 6(g) of the Act." As the District Court also observed (pp. 12a-13a and 17a, *infra*), the regulations adopted by the Secretary pursuant to the Alaska Statehood Act were consistent with the statute, but not his decision herein. This, too, brings into play the *Accardi-Service* principle discussed at p. 16, *infra.*

> original land descriptions as well as applications for the selection of additional lands." (p. 4a, infra).

The holding that the Secretary was entitled to accept the amendments as a timely reassertion of Alaska's original application is in direct violation of the Secretary's own regulations regarding amendments. 43 C.F.R. § 1821.6-6 provides as follows:

> "Where entries, selections, or locations are improperly allowed, as where the lands are not subject to such entries, selections or locations, *amendments will not be allowed,* because such claims, being invalid, should be cancelled, and upon cancellation thereof a new entry, selection or location may be allowed as though the former had never been made." (Emphasis added.)

Even if there were no regulation which prohibited amendments of invalid selections, the letters filed by the State could not be treated as selections of the lands here involved because they did not comply with the form prescribed for that purpose. The most obvious discrepancy is that, as the Court of Appeals acknowledged, the amendments "did not include the land descriptions set out in the original application" (p. 4a, *infra*); but the regulations expressly require descriptions of all lands selected.[12]

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[12] The grant in § 6(b) of the Alaska Statehood Act is implemented by 43 C.F.R. §2222.9-4. Paragraph (c)(4) thereof states that "Lands selected must be described as provided by § 2222.9-3(c)," the pertinent subparagraph of which states, "If the selected lands are unsurveyed and are described by approved protraction diagrams of the rectangular survey system, such description is required." 43 C.F.R. § 2222.9-3(c)(1)(iv).

The letters also fail to conform to 43 C.F.R. §§ 2222.9-3(c)(1)(ii)(b), (d) and (e), and 2222.9-3(c)(2). Compare the letter at n. 1 *supra* with the regulations at pp. 45a-48a, *infra.*

Each of the regulations whose violation by the Secretary was condoned by the court below, had been promulgated pursuant to authority granted by statute[13] and hence has the force of law. "That it binds him [the Secretary] as well as others while it is in effect is not doubted." *Chapman* v. *Sheridan-Wyoming Coal Company,* 338 U.S. 621, 629. The *Sheridan-Wyoming Coal* case anticipated—and applied to regulations of the same character as are involved in this case—what is now a firmly settled principle of administrative law: "that regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature." *Service* v. *Dulles,* 354 U.S. 363, 372, following *Accardi* v. *Shaughnessy,* 347 U.S. 260. See also *Vitarelli* v. *Seaton,* 359 U.S. 535; *Williams* v. *Zuckert,* 371 U.S. 531, 372 U.S. 765. That principle is wholly inconsistent with the holding below that the Secretary's action in this case in accepting the amendments as a timely reassertion of Alaska's

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[13] The Secretary derives general authority to promulgate regulations in aid of the public land laws from 43 U.S.C. § 1201. Other laws are additional sources of authority for certain subjects, *e.g.* 43 U.S.C. § 697 dealing specifically with amendments and various provisions of the Alaska Statehood Act.

Since the Secretary's award also contravened Public Land Orders 576 and 3022, we note that these stand on an equal legal footing with his regulations.

Congress expressly confirmed the President's power to withdraw public lands from entry (see also *United States* v. *Midwest Oil Co.,* 236 U.S. 459), and he in turn has delegated that authority to the Secretary by Executive Order. See p. 10a of the District Court's opinion.

original application can be sustained as an exercise of his "discretion." The Secretary had discretion to determine the effect which is to be given amendments to applications; and § 6(g) of the Alaska Statehood Act expressly gave the Secretary discretion to formulate the procedures by which Alaska would make selections thereunder, consistent with the statute. But having exercised his discretion to promulgate these rules, he was not free, while they remained in effect, to award lands to one claimant and deny them to another in derogation of his own regulations.

Regulations such as these govern all claims pursued under the public land laws by entry, competitive bidding or otherwise—whether the rights asserted are to the lands themselves or to the mineral riches, including oil and gas, located thereon.[14] Particularly because of the Secretary's discretion over these resources, they constitute an indispensable control and protect the public interest in the fair and impartial allocation of the public domain. It is the high function of the *Accardi-Service* principle to subject administrative officials to the rule of law, adherence to which is imperative in the disposition of the vast wealth over which Congress has given the Secretary control.

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[14] See, in addition to the laws cited in n. 13, *supra*, *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 336 text and note at n. 6. A further example of the pervasive scope of such regulations is section 8 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1337, authorizing the Secretary to grant leases to "the highest responsible qualified bidder by competitive bidding under regulations promulgated in advance." See *Union Oil Company Bid on Tract 228, etc.*, 75 I.D. 147, set aside *sub nom. Superior Oil Co.* v. *Udall*, D.C.D.C. 1521-68, unreported order, appeal pending C.A.D.C. Nos. 22, 192 and 22, 194.

II. The Decision Below Seriously Undermines the Administration of the Public Land Laws.

The magnitude and potential wealth of the territories affected by the decision below afford it unique importance. On December 11, 1968, the Secretary of Interior announced a proposal to withdraw from appropriation until December 31, 1970 "all unreserved public lands in Alaska" to protect the rights and interests therein of the native tribes.[15] Their disposition would thereupon be subject to the preference granted in § 6(g) with respect to lands restored from withdrawal. If the decision below is permitted to stand, Alaska would be free to select many millions of acres while they are reserved. In short, the vast remaining grant would be distributed, if the State chose, according to the procedures authorized by the Secretary in this case, rather than those prescribed by Congress.

The decision below would not only disturb the balance which Congress established between the interests of the State and other potential claimants by giving the State only a *limited* preference; it would have seriously

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[15] 33 F.R. 18591, par. 2 and 5.

At this writing, the withdrawal order has not issued, but the preliminary steps required by 43 C.F.R. § 2311 have been undertaken. On December 11, 1968 the Secretary approved the filing of an application for withdrawal by the Commissioner of Indian Affairs, 33 F.R. 18591, and on December 28, a notice inviting comments thereon by January 15, 1969 was published, 33 F.R. 19955.

In correspondence with the Governor of Alaska and the Chairman of the Senate and House Interior Committees explaining his approval of the application, the Secretary clearly expressed his intention to issue the withdrawal order. Department of the Interior Press Release, Dec. 11, 1968. It is, however, possible that his successor will take a different view. Even then, however, vast areas in the State would be in a state of withdrawal and their disposition governed by the law of this case.

adverse consequences on the formal administration of the land laws.

We have noted that the Statehood Act follows historic practice in permitting selections to be filed only upon lands which are open to entry. One reason that premature applications are given no effect is that they "would necessarily introduce confusion, uncertainty and irregularity in the local offices of the Land Department," *Lansdale* v. *Daniels,* 100 U.S. 113, 116. The Secretary's action would have precisely that effect, for while acknowledging the validity of the principle he disregarded it herein. Noting that "the State is the only applicant whom the land office permits to file 'prematurely' ", he concluded that there is "no likelihood that other applicants will clutter the records with their filings" (pp. 33a-34a, *infra*). This is a truly striking instance of administrative boot-strapping: The land office's "practice" of giving special treatment to the State—which is itself unauthorized and contrary to precedent[16]—is asserted as eliminating the need for, and thereupon as justifying noncompliance with, a procedure expressly mandated by Congress! But putting aside questions of *power,* the Secretary's reasoning is demonstrably unsound, for

[16] "If one person can maintain an application for land not available for leasing several or a hundred can." *J. G. Hatheway, et al.,* 68 I.D. 48, 52 quoted approvingly by the Secretary in this case, p. 31a *infra.* The principle has been applied with full vigor to deny effect to state selections filed on withdrawn lands, e.g. *Campbell* v. *Jackson,* 17 I.D. 417; *William Herth,* 22 I.D. 385; *Benson* v. *Idaho,* 24 I.D. 272; *Zeigler* v. *Idaho,* 30 I.D. 1, even where, as in *Zeigler* and the present case, the State enjoyed a preferred right of selection as soon as the lands became subject to entry.

the State alone would "clutter the records" of the land office by claiming even a small fraction of the lands to which it is ultimately entitled. And this "undue burden on the land office" (id.) would be particularly acute during the two years in which the Secretary proposes to reserve from settlement all public land in Alaska—on any of which the state could file under the decision in this case—although it could not do so if the Statehood Act were obeyed.

The adverse impact of the decision extends beyond the borders of Alaska, for it affects the operation of the system of land management as a whole. By awarding the disputed lands without regard to the requirements of his own regulations, the Secretary has undermined their reliability and consequently their utility. The indispensible role which the Department's procedural regulations fulfill in the administration of the public land laws is that they instruct prospective applicants how to perfect claims and advise them whether their claims have been anticipated by a prior valid application. The present case illustrates how these beneficent objectives are frustrated when the regulations are cast aside. In the Court of Appeals' view, petitioners suffered no prejudice by the Secretary's award of the lands to Alaska "inasmuch as they had notice of Alaska's claim to all such lands before they tendered their claims." But since that notice informed petitioners only that Alaska had made claims which were invalid under the applicable law—that is, the Alaskan Statehood Act and the regulations—they were entitled to include that the lands remained open and that their own entry under the public land laws would

be honored.[17] Such prejudice is not unique to this case; it is the inevitable consequence of any decision which permits the Secretary to disregard his regulations in adjudicating conflicting claims. Records and notices derive meaning only from the context of the law in effect at the time a claim is made; they are useless, or actively misleading, if that law does not control its ultimate disposition. The resulting uncertainty invites controversy and defeats the even-handed distribution of the public lands according to Congressional policy.

An even more devastating blow to these central objectives of land management was rendered by the Court of Appeals' novel holding that Alaska was entitled to the land because it "intended [its] amendment as a reassertion of the original land description" (p. 4a, *infra*). We are aware of no prior decision holding that a claimant can obtain rights in public lands by virtue of his intent—although he failed to manifest that intent by following the procedures prescribed by law.

The intent factor is wholly irrelevant to any proper legal consideration. If good intentions can excuse noncompliance with procedural regulations, these will promptly pass into disuse. And the necessity to evalu-

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[17] The notice declared that the State "*on January 8, 1963, and subsequent amendments thereto,* filed application Anchorage Serial 058566, for certain public lands * * * more particularly described as follows. * * *." (Emphasis supplied.) The notice described *subsequent amendments thereto,* filed application Anchorage Serial the lands which petitioners ultimately claimed, but did not assert that these had been selected on any date other than January 8. In legal terms, the notice meant that Alaska had made no valid selection of these lands, either on January 8, because they were not then "vacant, unappropriated or unreserved" as the Act required, or by the amendments, for none were permitted by the regulations.

ate intent would seriously impede the administration of the public land laws. If the choice between conflicting claimants is to turn on the intent of one or both of them, it will rarely be possible to resolve them on the basis of the formal applications, papers and notices which the regulations prescribe; evidentiary hearings are usually required where intent is in issue. Cf. *Poller* v. *CBS,* 368 U.S. 464. Such hearings would add greatly to the expense of entry proceedings, thereby discouraging prospective applicants, particularly under such laws as the homestead laws where the potential rewards are limited. Such hearings would also delay decision and, inevitably, occupancy and development of the lands. The central objective of public land management is the speedy and inexpensive distribution of the lands which Congress has made available to the public. A rule of law which necessitates evidentiary hearings before title to the lands can pass defeats that objective. A further undesirable characteristic of the intent factor is its inherent uncertainty. Unless their formal filings are deemed conclusive manifestations of the parties' intent—which is the precise opposite of what the Court of Appeals did here—inspection of those records will not reveal the status of the lands. We submit that the concept of intent is so potentially destructive of the orderly and even-handed administration of the public lands that this Court should uproot it now, on its first appearance.

CONCLUSION

For the foregoing reasons this Petition for Certiorari should be granted.

Respectfully submitted,

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